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FILED
JUL 22 1941
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 299

T. E. STEPHENS,

vs. *Petitioner,*

RICHMAN & SAMUELS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Hon. Harlan F. Stone, Chief Justice, and the Associate Justices, of the Supreme Court of the United States of America:

Your petitioner respectfully shows:

I.

Summary and Short Statement of the Matter Involved.

This is an action at law brought in the 93rd Judicial District Court of Hidalgo County, Texas, by the petitioner herein against respondent, and in due and proper time was properly removed from that court to the United States District Court for the Southern District of Texas, Brownsville

Division. (See Transcript of Record, p. 39, Order of Removal.) The case was not tried in the latter court on its merits, but upon motion filed by respondent to quash the process and dismiss the case, an order was entered by the United States District Court for the Southern District of Texas, quashing the process and dismissing the case. (See Transcript of Record, Order Quashing Service and Dismissing the Cause, Memorandum Opinion of the Lower Court, p. 278, and Final Decree, p. 290.)

An appeal was taken from said judgment of dismissal and quashing of service by your petitioner to the United States Circuit Court of Appeals for the Fifth Circuit, and that Court, on the 1st day of April, 1941, affirmed the judgment of the lower court (see Transcript of Record, Memorandum Opinion, p. 402, and Judgment, p. 404); and on the 10th day of May, 1941, overruled your petitioner's motion for rehearing. (See Transcript of Record, Order Denying Rehearing, p. 412.)

For cause of action against the respondent, your petitioner alleged in substance in his pleading that he was a citizen of Texas, residing in Hidalgo County, Texas, at all times during which the matters in controversy arose; that respondent was first doing business under the name of the partnership of Richman & Samuels, and that your petitioner was their general agent in Texas, handling the partnership's business of buying and selling vegetables of all kinds in Hidalgo, Cameron and Starr Counties, under an agreement that petitioner would be allowed a drawing account varying from year to year, and a certain percentage of the net profits on the business done by the partnership, this percentage also varying from year to year; that respondent was incorporated in 1925, and took over the business of the partnership and assumed the obligations of the partnership; that the partnership "clipped" or made false returns to petitioner as to the net profits of the business

done by the partnership; that respondent did the same thing until about the year 1927, when your petitioner went into the vegetable business for himself, and then respondent's agent solicited your petitioner to consign to respondent vegetables in carload lots, which respondent did in an amount of many hundreds of carloads; that respondent again "clipped" and made false returns. Petitioner never discovered the fraud as to this clipping until shortly before the filing of this suit. The amount sought to be recovered by petitioner for his share of the said profits when he was working for respondent and said partnership, and the amount fraudulently retained from the vegetables consigned by petitioner to respondent by the "clipping" aforesaid, exceeds Three Thousand Dollars by a large sum. (See Transcript of Record, Plaintiff's First Amended Original Petition, pp. 66-100, inc.) The respondent is a corporation organized under the laws of the State of New York, with its principal place of business in the City of New York. When respondent obtained a permit to do business in Texas in 1934, it appointed Travis B. Moursund as its State agent for service, as required by Article 2031a of the Revised Civil Statutes of Texas, 1925 Revision, as a condition precedent to its right to obtain a permit. (See Transcript of Record, p. 120, Power of Attorney designating Travis B. Moursund as agent for service for Richman & Samuels, Inc.) (See, also, Transcript of Record, p. 127, Stipulation, Respondent ceasing to do business in Texas prior to January 19, 1938; as to revoking Moursund's power of attorney January 25, 1938.) Shortly before your petitioner filed his suit, respondent surrendered its permit to do business in Texas, and revoked the power of attorney of Travis B. Moursund as its agent for service. (See Transcript of Record, p. 124, Application to Surrender Permit, dated January 15, 1938; and p. 123, Surrender of Permit.) Petitioner had no knowledge of this revocation

at the time he filed his suit and process was issued and served on Travis B. Moursund, nor was said revocation filed with the Secretary of State of Texas, nor any agent for service appointed by respondent as the successor to Travis B. Moursund. (See Transcript of Record, p. 127, Stipulation; also pp. 110-111, Deposition of Edward Clark.)

There are really two issues presented to this Court:

(1) Did respondent, in appointing or designating Travis B. Moursund as its State agent for service as required under Article 2031a of the Revised Civil Statutes of Texas, 1925 Revision, waive its privilege to be sued in the district of its domicile, and consent or agree that process served on said agent in this case was valid; and, if so, was the order of the court quashing the same error?

(2) Regardless of the validity of said process, was it error for the trial court to dismiss your petitioner's case?

II.

Statement Disclosing the Jurisdiction of This Court.

This Court has jurisdiction under Section 240a of the Judicial Code, and its amendments, in view of the fact that the judgment of the Fifth Circuit Court of Appeals affirming the judgment of the trial court, was entered on the 1st day of April, 1941, and your petitioner's motion for rehearing was overruled on the 10th day of May, 1941, and this petition has been filed within less than three months after the judgment of the Circuit Court of Appeals for the Fifth Circuit was entered, overruling your petitioner's motion for rehearing in that court; also under Section 262 of the Judicial Code (28 U. S. C. A. 377); and also under the holding of this Court in the case of *In re 620 Church Street Building Corporation, et al.*, 57 S. Ct. 88, 299 U. S. 24, 81 L. Ed. 16, in which it is in effect held that the jurisdiction of this Court affords ample authority for issuing the writ

requested as an auxiliary process and as a means of "giving full force and effect to existing appellate authority and of furthering justice in kindred ways."

III.

Questions Presented.

In quashing the service of process issued out of the 93rd Judicial District Court of Hidalgo County, and served upon Travis B. Moursund who had theretofore been duly appointed by respondent as its State agent for service as required by Article 2031a of the Revised Civil Statutes of Texas, 1925 Revision, and dismissing petitioner's petition after the case had been removed by respondent to the Federal Court, the legal questions presented to this Court as a result of said action of the lower courts, are:

(1) Did the appointment by respondent of Travis B. Moursund as its State agent for service of process, in pursuance of Article 2031a of the Revised Civil Statutes of Texas, 1925 Revision, constitute a consent of respondent to be sued in the Texas courts, both State and Federal, by your petitioner on the cause of action alleged in his petition, and a waiver by respondent of its privilege to be sued in the district of its domicile?

(2) Your petitioner being a citizen of Texas and having brought his suit in the 93rd Judicial District Court of Hidalgo County, and the amount involved, exclusive of interest and costs, being far in excess of Three Thousand Dollars, and respondent being a foreign corporation,—did the order of the trial court and the affirmance of its action by the Circuit Court of Appeals for the Fifth Circuit, in quashing the service of process in this case had upon Travis B. Moursund as the State agent for service of respondent, involve a question of jurisdiction of the trial court, or did it involve a question of venue; and, if venue, did respondent waive the same when it executed and filed for record

its power of attorney appointing Travis B. Moursund as its State agent for service as provided in Article 2031a of the Revised Civil Statutes of Texas, 1925 Revision?

(3) In view of the provisions of Article 2031a of the Revised Civil Statutes of Texas, 1925 Revision, and the provisions in the power of attorney executed by respondent appointing Travis B. Moursund as its State agent for service of process,—does the validity of the process thus quashed by the order of the trial court, and affirmed by the Fifth Circuit Court of Appeals, depend upon the question as to whether or not your petitioner's cause of action against respondent shall have arisen in Texas, or is it sufficient to sustain the validity of said process and jurisdiction of the court, that your petitioner's cause of action shall have arisen out of business conducted by the respondent in Texas with petitioner while your petitioner was a citizen of Texas?

(4) In view of the provisions of Article 2031a of the Revised Civil Statutes of Texas, 1925 Revision, that provide conditions precedent of respondent, a foreign corporation, to obtaining a permit to do business in Texas, for the appointment of a State agent for service of process in all actions pending and those that might afterwards be filed against respondent,—was respondent's attempted revocation of its appointment of Travis B. Moursund as its State agent for service of process effective to the extent that it invalidates the service of process in this case had upon Travis B. Moursund?

(5) The undisputed evidence showing that petitioner's contracts with respondent and its predecessor partnership were made in Texas, and your petitioner performed all of his services in Texas, and respondent solicited your petitioner's business in Texas,—did your petitioner's cause of action sued on as a matter of law arise in Texas?

(6) Are the provisions of Article 2031a of the Revised Civil Statutes of Texas, 1925 Revision, providing

> "A power of attorney designating some individual who is a resident citizen of this State as its service agent on whom process may be served in all suits, proceedings, and causes of action pending or hereafter filed in this State in which said corporation is a party or is to be made a party, which power of attorney shall be in effect so long as said foreign corporation is authorized to do business in Texas and for a period of four years from and after the date any such foreign corporation shall have surrendered its charter or has ceased to do business in Texas,"

such language as in decency and common honesty compels this Court to construe the statute to include causes of action arising out of the State of Texas for which the appointment was given or made?

(7) Do the provisions in the power of attorney executed by respondent appointing Travis B. Moursund as its State agent for service

> "does hereby make, constitute and appoint Travis B. Moursund * * * its true and lawful attorney in fact for and in the State of Texas, upon whom all process of law against said corporation and any action or legal proceeding may be served, subject to and in accordance with the provisions of the laws of the State of Texas and all amendments thereto, and the said corporation hereby specially agrees that any and all lawful process against it which may be served upon its said attorney in fact shall be deemed valid personal service upon said company and shall be of the same force and validity as if served upon said corporation, and this authority shall continue in full force as long as said corporation is authorized to do business in Texas and for a period of four years from and after the date said corporation shall have surrendered its charter,"

constitute such language as compels this Court in honesty and common decency to the conclusion that respondent voluntarily waived its privilege to be sued in the district of its domicile, and voluntarily consented that it might be sued in Texas by your petitioner on the cause of action asserted by petitioner to have grown out of business transactions had between your petitioner and respondent in Texas, and an agreement on the part of respondent that process thus served on its State agent, Travis B. Moursund, would be valid in this case?

IV.

Reasons Relied Upon by Your Petitioner for Granting of the Requested Writ of Certiorari.

(1) As heretofore pointed out in this petition, this Court has jurisdiction.

(2) The decision of the Circuit Court of Appeals for the Fifth Circuit involves the proper interpretation and construction of Article 2031a of the Revised Civil Statutes of Texas, 1925 Revision.

(3) The holding of the Circuit Court of Appeals for the Fifth Circuit, that the provisions of Article 2031a aforesaid of the Revised Civil Statutes of Texas, 1925 Revision, apply only to causes of action arising within the State of Texas, does violence to the spirit and purpose of the statute, because it clearly applies to causes of action arising out of business conducted by the corporation or had in relation to corporate acts done in Texas, and therefore applies to your petitioner's cause of action because the uncontradicted evidence shows that your petitioner's contracts with respondent were made in Texas, your petitioner performed all his services in Texas, and respondent's agent solicited your petitioner's business in Texas; and is contrary to holdings of this Court in the case of *Louisville & N. R. Co.*

v. *Chatters* and *Southern Ry. Co. et al.* v. *Chatters*, 49 Sup. Ct. Rep. 329.

(4) The holding by the Fifth Circuit Court of Appeals in this case that Petitioner's cause of action as alleged in his petition and as shown by the evidence arose beyond the boundaries of the State of Texas, is clearly erroneous, because the undisputed evidence showed that your Petitioner's contracts were made in Texas and he performed all of his services in Texas; and said holding is clearly in conflict with the following decisions of the Texas courts: *Hoffer Oil Corporation* v. *Brian*, 38 S. W. (2d) 596, and *Stanolind Oil & Gas Co.* v. *Christian*, 64 S. W. (2d) 363.

(5) The holding by the Fifth Circuit Court of Appeals in this case that Article 2031a of the Revised Civil Statutes of Texas, 1925 Revision, applies during the four years after the corporation ceased to do business in Texas, only to causes of action arising within the State of Texas, is clearly erroneous, because the following language in said statute compels this Court to hold said statute to include causes of action arising outside of the State of Texas, to-wit:

> "A power of attorney designating some individual who is a resident citizen of this State as its service agent on whom process may be served in all suits, proceedings, and causes of action pending or hereafter filed in this State in which said corporation is a party or is to be made a party, which power of attorney shall be in effect so long as said foreign corporation is authorized to do business in Texas and for a period of four years from and after the date any such foreign corporation shall have surrendered its charter or has ceased to do business in Texas."

(6) The holding of the Fifth Circuit Court of Appeals that Article 2031a of the Revised Civil Statutes of Texas, 1925 Revision, applies during the four years after a corporation ceases to do business in Texas, only to causes of

action arising within the State of Texas is clearly erroneous, because the following language contained in the power of attorney appointing Travis B. Moursund by the Respondent as its State agent for service, compels this Court to hold that Respondent voluntarily waived its privilege to be sued in the district of its domicile, and consented voluntarily that it might be sued in Texas by Petitioner on the cause of action alleged by petitioner in his petition, and that the process served on its agent, Travis B. Moursund, would be valid:

> "does hereby make, constitute, and appoint Travis B. Moursund * * * its true and lawful attorney in fact for and in the State of Texas, upon whom all process of law against said corporation and any action or legal proceeding may be served, subject to and in accordance with all the provisions of the laws of the State of Texas and all amendments thereto, and the said corporation hereby specially agrees that any and all lawful process against it which may be served upon its said attorney in fact shall be deemed valid personal service upon said company and shall be of the same force and validity as if served upon said corporation, and this authority shall continue in full force as long as said corporation is authorized to do business in Texas and for a period of four years from and after the date said corporation shall have surrendered its charter."

(7) The holding of the Fifth Circuit Court of Appeals, in affirming the judgment of the trial court in quashing service of process in this case and dismissing your Petitioner's case, is in direct conflict with the holding of this Honorable Court in the case of *Neibro Company* v. *Bethlehem Shipbuilding Corporation*, 60 Sup. Ct. Rep. 153, in that the *Neibo* case holds that the Federal courts have jurisdiction in all cases where the necessary diversity of citizenship exists and the required amount in controversy is involved, and that it is a question of privilege of the defendant as to

the venue of the court, and this he may waive, and in fact does waive, where he appoints an agent for service of process and consents that that process shall be valid. And, therefore, it is immaterial where a cause of action may have arisen. But in this case the holding of the Fifth Circuit Court of Appeals is to the contrary, because it holds that such an appointment and such waiver and such consent are limited to causes of action arising within the jurisdiction of the State of the residence of the agent appointed.

(8) Even if it be admitted that the process served on Travis B. Moursund in this case should have been quashed, the trial court should not have dismissed your petitioner's case, nor should the Circuit Court of Appeals for the Fifth Circuit have affirmed the order of the trial court dismissing your Petitioner's case, because under the provisions of Article 2031a of the Revised Civil Statutes of Texas, 1925 Revision, your Petitioner should have been given an opportunity to have cited Respondent by serving process on the Secretary of State of Texas, because under the provisions of said statute, the Secretary of State becomes Respondent's agent for service when Respondent surrenders its permit and ceases to do business in Texas and revokes its power of attorney for service of process on Travis B. Moursund and does not appoint or designate "immediately" another agent for said purpose.

(9) The Fifth Circuit Court of Appeals has decided an important question of local law in the interpretation and construction of Article 2031a of the Revised Civil Statutes of Texas, 1925 Revision, in holding that the same only applies to causes of action arising in Texas, contrary to, and probably in conflict with what will be the local decisions on that question of the courts of Texas, when the statute comes before said courts for interpretation and construction.

(10) The holding of the Fifth Circuit Court of Appeals that your Petitioner's cause of action did not arise in Texas, in view of the fact that the undisputed evidence showed that all of your Petitioner's services were rendered to Respondent in Texas, is absolutely in conflict with the decision of the Texas courts in the following cases: *Hoffer Oil Corporation* v. *Brian,* 38 S. W. (2d) 596, and *Stanolind Oil & Gas Co.* v. *Christian,* 64 S. W. (2d) 363.

(11) Your Petitioner's causes of action alleged in his pleadings are not barred under the applicable statute of two years' limitation of Texas, because the statute is suspended as against your Petitioner's causes of action until your Petitioner obtained knowledge of the facts constituting said fraud, or knowledge of such facts as put him upon inquiry which, if diligently pursued, would have disclosed said facts, and this knowledge he has alleged not to have acquired until just a few months before filing his suit in the 93rd Judicial District Court of Hidalgo County, Texas.

(12) In the event your Petitioner's suit is dismissed, your Petitioner could not institute and successfully prosecute his suit in the courts of New York, because his causes of action would be barred under the applicable statutes of limitation of that State.

WHEREFORE, your Petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and the proceedings of said Fifth Circuit Court had in said case numbered 9391 and entitled on its docket *T. E. Stephens, Appellant,* v. *Richman & Samuels, Inc., Appellee,* to the end that this case may be reviewed and determined by this Court as provided by the statutes of the United States and the decisions of this Hon-

orable Court, and that the judgment herein of said Fifth Circuit Court of Appeals be reversed by this Honorable Court; and for such further relief as to this Court may seem proper in the premises.

Dated July 22, 1941.

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